Supreme Court, U.S.
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No. 86-264

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JOHN ALFARONE, JOSEPH GIORDANO, and BRIAN GORDON, as Trustees of the Tapers Industry Insurance Fund and of the Tapers Industry Annuity Fund, DANIEL JONES individually and as a participant in the Tapers Industry Insurance and Annuity Funds, and on behalf of all other persons who are, will be, or have at any time since July 1, 1980 been participants or beneficiaries in the said funds, similarly situated, and UNION APPOINTED TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS,

Petitioners,

against

BERNIE WOLFF CONSTRUCTION CORP., EMPLOYER TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS, COMPONENT ASSEMBLY INC., NATASI-WHITE, INC., CIRCLE INDUSTRIES CORP., and QUICK-WAY FINISHERS INC.,

Respondents.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Preliminary

The first-named Respondent, Bernie Wolff Construction Corp., has not served a brief in opposition to the Petition for Certiorari. Each of the other Respondents has, however. The three such briefs will, for convenience, be referred to below as "Component," "Nastasi" and "Employer Trustees," and page references thereto will be given after such identi fying names.

1. Each of the employers is bound by the bargaining agreements to pay contributions

Neither Component nor Nastasi denies that it entered into the successive bargaining agreements, with Local 1974, in 1980 and again in 1983, which obligate it to pay contributions to the Petitioners' funds. Neither of the two employers denies that it has, during the six-year period covered by the two agreements, per-

formed work covered by the bargaining agreements. From these uncontested facts, the obligation of each Respondent employer to pay contributions to the Funds is clear.

Nastasi argues (page 14) that it signed another agreement with another union and paid wages and benefits in accordance with that other agreement. Even if proven, however, that assertion would be irrelevant: Nastasi is required, by its bargaining agreements with Local 1974, to pay contributions to Petitioners' funds. It cannot pick and choose. Cf. O'Hare v. General Marine Transport Corp., 740 F.2d 160, 170 (2d Cir. 1984) ("It was obliged to pay into the funds established by the Agreement").

2. This suit is not brought by or for Local 1974

Component (page 2-3) and Nastasi

(page 5) accuse Petitioners, the union-appointed trustees of two employee-benefit funds, of pursuing an ulterior purpose: namely, of seeking to vindicate Local 1974's jurisdictional rights.

To buttress its assertion, Nastasi (pages 10-11) mis-describes the complaints in these actions and asserts that they "mean" that the employers employed members of another union instead of members of Local 1974 to perform the work in question. A similar mis-description may have misled the Second Circuit (see: Pet.Cert.,App.A, page 5a).

The complaints in these actions make no such allegation. They do not allege that Local 1974 members should have been employed; and they do not allege that members of another union were. What they do allege (see: Pet.Cert., pages 4-5) is that Respondent employers performed

(either through persons employed directly or through non-signatory subcontractors) work covered by the bargaining agreements and thereby became obligated to pay contributions to the funds, but have failed to pay such contributions.

It is irrelevant to this action whether the persons employed were or were not members of Local 1974. The employers' obligation to pay contributions to the funds is the same whether they were or were not.* And the complaints do not say whether they were or not.

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* As previously noted, Pet. Cert. pages 6-7, n. 4, the district court expressed, by comment, a different view; see: Pet. Cert.App. 12b, 13b, 14b, 21b. Its view, as noted, is mistaken. Moreover, in each instance the court made its comment after it had found lack of standing. Its comments were therefore dicta and have no juridical weight. Cf. Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272, 1279 (7th Cir. 1983); Spatt v. New York, 361 F.Supp. 1048, 1051-1053 (E.D. N.Y.)(three-judge court), aff'd by order 414 U.S. 1058 (1973).

Apparently also in support of their accusation, Component (page 2) and Nastasi (page 5) cite Drywall Tapers v. Operative Plasterers, 601 F.2d 675 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980), in which Local 1974 protested dismissal (eight years ago) of certain damage claims against other unions.

Drywall Tapers has no apparent relevance here. As the Petitition for Certiorari in that case (docketed as No. 79-779) points out (at pages 8, 9), an AFL-CIO Hearings Panel had rendered a jurisdictional award in which it "ruled for Painters and thus for Local 1974" on the submitted jurisdictional question but then proceeded to "moot" Local 1974's claims for damages for the other unions' past violations on the ground that "This decision, now supersedes and renders moot all controversies arising out of

past assignemnts, and this decision contains full and final relief for all claims ... and no further relief whatsoever is warranted."

It was the latter ruling, "mooting" Local 1974's claims for further relief from the other unions, that Local 1974 challenged unsuccessfully in Drywall Tapers, supra; see: Ibid, 601 F.2d at 678.

That decision is obviously irrelevant here. These suits are brought, not to recover relief for Local 1974 but to collect contributions due the funds. No claim of injury to Local 1974 or of infringement of its jurisdictional rights is made. It seeks to protect the funds, their participants and beneficiaries.

3. Each trustee is "a fiduciary"

Component (page 26) and Nastasi (pages 19-21) argue that the phrase, "a fiduciary," as used in § 502(e)(1) and (g)-

(2) of ERISA, 29 U.S.C. § 1132(e)(1) and (g)(2), cannot refer to one person but can only refer to all trustees collectively.

If their argument were sound, use of the plural ("fiduciaries") would be an absurdity; and the phrase, "another fiduciary," would be meaningless. Compare: §§ 402(a) ("one or more named fiduciaries") and 405 ("another fiduciary"; "such other fiduciary"); 29 U.S.C. §§ 1102(a), 1105(a).

§ 403(a) of ERISA, 29 U.S.C. 1103(a), makes clear that the persons described in § 402(a) as "named fiduciaries" are the trustees of the plan. And by its use of the plural, § 402(a) makes clear that the term is not used collectively: that, i.e., each trustee is a "named fiduciary."

Reading § 502(e)(1) and (g)(2) con-

sistently with §§ 402(a), 403(a) and 405(a) (as Nastasi, page 20, correctly reminds us we must) thus compels the result that suit to enforce § 515 of ERISA and to thereby recover for a plan contributions due it may be brought, pursuant to § 502(e)(1) and (g)(2), by any (or by any several) of the trustees of the plan. That result is plainly in accord with Congress's policy. See: Pet. Cert., pages 11, 12, 17-18.

4. Respondents have not succeeded in resolving the conflict between Circuits and with this Court

Each Respondent attempts to distinguish those decisions of other Circuits and of this Court that hold that a contract to arbitrate should not bar a suit to enforce a statutory right; thus:

Component (pages 14-15) argues that § 515 of ERISA does not create a statutory right; in its view, Congress la-

bored toward no end at all.

Nastasi (pages 24-26) and Employer Trustees (pages 20-26) argue that the right to sue on a statutory claim despite a contract to arbitrate applies only to individual claims; delinquency collection, say they, enjoys less favored status.

Neither Respondent offers any authority to support its attempted distinction. Nor can either distinction be rationally defended. Congress regarded delinquency collection as having a high priority and therefore created a statutory right where none had existed. The public interest in prompt delinquency collection is not inferior to the public interest in individual claims.

Respectfully submitted,

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